86-1450

No. .

In the
Supreme Court of the United States.

OCTOBER TERM, 1986.

PETROS A. PALANDJIAN,
PETITIONER,

v.

ASHRAF PAHLAVI,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Question Presented.

Whether the granting of summary judgment is erroneous where the trial court must make a factual determination concerning the opposing party's state of mind and where such factual determination was based on inferences which did not favor the opposing party?

List of the Parties.

All parties to this action appear in the caption of this petition.

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Introductory Prayer.

The Petitioner, Petros A. Palandjian ("Palandjian") respectfully prays that a writ of certiorari issue to review the order of judgment of the United States Court of Appeals for the First Circuit (the "First Circuit") entered in this proceeding on December 8, 1986.

Opinions Below.

The opinion of the First Circuit, dated December 8, 1986 ("Op."), was not reported. It is reprinted in the Appendix attached hereto ("App.") at App. Q, 96a. Also reprinted therein are the order of the District Court for the District of Massachusetts (the "District Court"), dated February 24, 1986 (App. L, 60a), the *per curiam* opinion of the First Circuit dated January 30, 1986 (App. N, 62a), the memorandum and order of the District Court, dated August 26, 1985 (App. O, 66a) and the opinion of the District Court, dated August 16, 1985, which is reported at 614 F. Supp. 1569 (D. Mass. 1985) (App. P, 71a).

Jurisdiction.

The First Circuit judgment was entered on December 8, 1986. This Petition for Certiorari was filed within ninety-one days of that date in accordance with 28 U.S.C. § 2101(c) and Supreme Court Rule 29.1, which allows a party to file a petition on the business day following the last day of the ninety day period if, as here, the last day falls on a Sunday. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Statutes Involved.

Federal Rule of Civil Procedure 56(c), codified in 28 U.S.C., provides in pertinent part that:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories

> and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

(App. A, 1a)

Federal Rule of Civil Procedure 56(e), codified in 28 U.S.C., provides in pertinent part that:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(App. A, 2a.)

Statement of the Case.

Palandjian brought suit against Pahlavi to recover for services rendered and for investments made in several business ventures he had entered into with respondent Ashraf Pahlavi, the twin sister of the former Shah of Iran ("Pahlavi"). Pahlavi asserted a statute of limitations defense and Palandjian claimed that he did not file suit sooner because of duress and because of his fear that Pahlavi and her family would retaliate if he did so. The jurisdiction of the District Court was invoked under 28 U.S.C. § 1332 by reason of diversity of citizenship, Palandjian

being a citizen of Massachusetts and Pahlavi being a citizen of Iran. The discussion below relates the basis for Palandjian's claim of duress, the procedural posture of the case and the findings of the First Circuit.

In June 1966, Palandjian, a dual national Iranian/American citizen who has resided in the United States since 1963, first met Pahlavi when she accompanied Leon Palandjian (hereinafter "Leon"), Palandjian's brother and Pahlavi's personal assistant, on a week long visit to Boston (Palandjian Affidavit dated November 30, 1983 ("Pal. Aff. I"), para. 4; App. B, 4a; Palandjian Affidavit dated December, 1984 ("Pal. Aff. II") para. 2, App. C, 10a). During this visit, Pahlavi proposed to Palandjian that they develop property she owned or could purchase on the Caspian Sea at Babolsar, Iran (Pal. Aff. I, para. 6; App. B, 4a). They agreed that Pahlavi would provide the property, valued at approximately $2 million; Palandjian would invest up to $2 million in time, equipment and personnel for construction; Palandjian and Leon would form a company to develop the Babolsar land; and Palandjian would charge cost plus fifteen percent (15%) for construction work on the project (Pal. Aff. I, para. 7; App. B, 5a). After the repayment of any loans or bank debts and the repayment to Pahlavi and Palandjian of their initial investments, all profits would be divided equally between them. (*Id.*)

Pahlavi and Palandjian also discussed the need for aviation development in Iran (Pal. Aff. I, para. 10; App. B, 6a). They agreed to contact Cessna Aircraft to obtain an exclusive distributorship for Cessna Aircraft in Iran (*Id.*) Palandjian was to have an eighty-five percent (85%) interest and Pahlavi a fifteen percent (15%) interest in all profits arising therefrom. (*Id.*)

The agreements between Palandjian and Pahlavi concerning Kazar Shahr and Cessna were oral (Pal. Aff. I, para. 7 and 10; App. B, 5a, 6a). Palandjian did not ask Pahlavi to sign a written contract on these matters for fear of insulting her (Pal. Aff. II, para. 6; App. C, 11a). There are however many docu-

ments, produced by Palandjian in the course of the proceeding below, which evidence his involvement in these projects and his performance of these contracts (Pal. Aff. II, para. 26; App. C, 14a).

Pursuant to these agreements, Palandjian and Leon formed a company, Abadani Jazayer, to develop Kazar Shahr (Pal. Aff. I, para. 8; App. B, 5a). The shares of Abadani Jazayer were given to Palandjian's father, Grigor Palandjian (hereinafter "Grigor") to hold in his safe in Tehran. Fifty percent (50%) of the shares were for the benefit of Pahlavi and fifty percent (50%) were for Palandjian. (*Id.*)

Palandjian obtained the exclusive distributorship for Cessna Aircraft in Iran (Pal. Aff. I, para. 10; App. B, 6a). Palandjian and Leon formed a company, Hooraseman, to sell aircraft and parts and gave the Hooraseman shares to Palandjian's father to hold (Pal. Aff. II, para. 9; App. C, 11a).

From 1966 to July 1969, Palandjian performed his part of the agreement concerning the development of Kazar Shahr (Pal. Aff. I, para. 12; App. B, 6a) and the Cessna distributorship. He performed such work in Iran and Massachusetts.

In July 1969, Leon, who had been president of both companies, died in an airplane crash in Iran (Pal. Aff. II, para. 10; App. C, 11a). At Pahlavi's request, Palandjian assumed the title of President of Abadani Jazayer and Hooraseman and moved to Iran to supervise the two operations. (*Id.*)

During the 1969-1970 period, Palandjian directed and substantially completed site preparation of the development at Kazar Shahr: grading and leveling, sewers, lighting, electricity, roads, water, the base course for asphalt, towers, reservoirs, wells and landscaping (Grigor Nazarian Deposition dated November 2, 1984, ("Naz. Dep."); App. D, 17a, 18a). The cost to Palandjian for this construction work was approximately one million seven hundred thousand dollars (Pal. Aff. II, para. 14; App. C, 12a). In 1970, the lots at Kazar Shahr were ready for marketing (Pal. Aff. I, para. 13; App. B, 6a).

In December 1970, Palandjian had a dispute with Pahlavi concerning the amount of time he spent in Iran and his interest in selling Abadani Jazayer and Hooraseman (Pal. Aff. II, para. 15; App. C, 12a). Palandjian had received two offers to purchase Abadani Jazayer, one for ten million dollars and one for sixteen million dollars, and had signed papers to sell Hooraseman for one million dollars. (*Id.*)

Pahlavi was angered by Palandjian's suggestion that the businesses be sold. She threatened Palandjian in writing:

> I swear to my highest belief that you will never set foot in Iran while I am alive. You are free to leave here whenever you want even if you want to leave tonight. P.S. You are free to go wherever you want.

(Pal. Aff. II, para. 16; App. C, 12a.)

Fearing Pahlavi's threat to him, Palandjian did not return to Iran (Pal. Aff. II, para. 17; App. C, 12a). He returned to Massachusetts to supervise the activities of Abadani Jazayer and Hooraseman. (*Id.*)

Pahlavi subsequently moved to wrest control over the projects from Palandjian. In early 1971, Pahlavi named one Sanatizadeh as the new president of Abadani Jazayer. Sanatizadeh went to Abadani Jazayer's office in Tehran, Iran where he was verbally abusive and threatening both to the staff and to Grigor (Naz. Dep.; App. E, 20a, 21a). He announced that all documents and models were to be handed over to him as he was taking over the company, and the staff unwillingly complied. *Id.*[1]

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[1] Before following Sanatizadeh's order, the project manager called Palandjian in the United States. Palandjian instructed him to comply with Sanatizadeh's demands, stating: "You can't oppose them (Pahlavi). You can't keep the project. If they want, you have to give them." (Naz. Dep.; App. E, 21a.)

Izadi, Pahlavi's personal assistant, visited Grigor to gain possession of the shares which Grigor held. Izadi demanded the shares, telling Grigor "We will have you killed" and "If you and your son and family want to live here without any danger, give me the stocks." (Grigor Palandjian Deposition dated September 13, 1984 ("Grigor Dep."); App. F, 24a, 25a). Grigor telephoned Palandjian who spoke with Pahlavi several times concerning Izadi's demand. Pahlavi stated that, as Palandjian had been holding her shares for several years, she was now going to hold his shares for him (Pal. Aff. II, para. 19; App. C, 12a). Given Pahlavi's insistence, her threats, her position in the royal family and her statement that she would hold his shares for his benefit, Palandjian acceded to the demand (Pal. Aff. II, para. 20; App. C, 12a, 13a).

Shortly thereafter, in 1971, Pahlavi's cousin, Shahriar Dadsetan, visited Palandjian in Massachusetts. Dadsetan told Palandjian that he either had to return to Iran at Pahlavi's direction or relinquish his rights to the Cessna distributorship, which Pahlavi wanted for her son Chahram (Pal. Aff. I, para. 17; App. B, 6a, 7a; Pal. Aff. II, para. 21; App. C, 13a). Still fearing Pahlavi's past threats, Palandjian was unwilling to return to Iran (Pal. Aff. II, para. 21; App. C, 13a). Dadsetan became increasingly belligerent, stating, "She wants Cessna Aircraft. She wants you to give up Cessna if you're not coming back" and "I'm sure you don't want to take a chance and have something unpleasant happen to your mom, to your dad. They have a pleasant life." (*Id.*) Palandjian called Pahlavi in Iran to determine why Dadsetan was threatening him. (*Id.*) Pahlavi said that Dadsetan was her representative and that Palandjian was to do what Dadsetan said. (*Id.*) After this conversation, Palandjian unwillingly signed papers which effectively turned over the Cessna distributorship to Pahlavi's representative. (*Id.*)

From 1971 through 1982, Palandjian remained in contact with Pahlavi, speaking with her by phone and periodically meeting her in Geneva or New York (Pal. Aff. II, para. 22; App. C, 13a). To one of these meetings, Palandjian was accompanied by an attorney (Op.; App. Q, 99a). During these calls and meetings, Palandjian raised the issue of monies Pahlavi owed him from Hooraseman and Abadani Jazayer. Pahlavi acknowledged her debts to him. (*Id.*) At a meeting in Geneva in 1972, Pahlavi told Palandjian that she had instructed Izadi to pay him one million seven hundred thousand dollars for the unpaid portion of his construction work on the Kazar Shahr development (Pal. Aff. II, para. 23; App. C, 13a, 14a). Palandjian told her he had not received the money. (*Id.*) To convince Palandjian of his error in recommending the sale of Abadani Jazayer and Hooraseman, she added that the project had already made twenty-five million dollars and would make in excess of fifty million dollars. (*Id.*) When Palandjian asked to be paid for his share of the profits, Pahlavi assured him that he would be paid. (*Id.*)[2] Palandjian to date has received no payment for his interests in Abadani Jazayer and Hooraseman (Pal. Aff. I, para. 19; App. B, 7a).

Until 1983, Palandjian refrained from suing Pahlavi because he feared the consequences to his family and property in Iran and the United States (Pal. Aff. II, paras. 20, 21 and 25; App. C, 12a, 13a, 14a). Like many Iranians, Palandjian believed that the royal family would return to power and that the Pahlavi family would continue to exercise control while outside Iran (Pal. Aff. II, para. 25; App. C, 14a). It was not until after the Shah died in 1980 and the Pahlavis had been out of power for five years that Palandjian felt he could commence this liti-

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[2] In an interview published in February 1982 in the *Boston Globe*, Pahlavi stated that she had sold 1400 vacation homes in Kazar Shahr and that the Kazar Shahr development was her only source of revenue (Ronald Koven Deposition dated October 26, 1984; App. G, 31a).

gation without endangering the lives and property of his family and himself. (*Id.*)

Palandjian filed suit against Pahlavi on July 27, 1983 wherein he alleged breach of contract (Count I), conversion (Count II), unjust enrichment (Count III), and quantum merit (Count IV). By amended complaint of July 19, 1984, Palandjian also claimed breach of fiduciary duty (Count V) (Amended Complaint dated July 19, 1984; App. H, 36a).

Following the completion of discovery, Pahlavi filed her Motion for Summary Judgment on November 14, 1984, asserting Palandjian's claims were barred by the statute of limitations and the statute of frauds (App. I, 46a). By order of August 16, 1985, the trial court denied Pahlavi's Motion on her statute of limitations grounds; the court also dismissed Counts III and V of the amended complaint, stating that Palandjian could not maintain inconsistent and alternative factual allegations (App. P, 71a). By order of August 26, 1985, the trial court denied Pahlavi's Motion on her statute of frauds defense (App. O, 66a).

In its August 16, 1985 order, the trial court invited Pahlavi to seek an interlocutory appeal, pursuant to 28 U.S.C. § 1292(b), of the limited issue of the extent of the duress exception to the Massachusetts statute of limitations. *Palandjian* v. *Pahlavi*, No. 83-2199-Y at 17 (D. Mass. August 16, 1985) (order denying summary judgment) (App. P, 71a). Pahlavi filed an interlocutory appeal on August 30, 1985. In a *per curiam* opinion, the First Circuit vacated its order allowing the interlocutory appeal and directed the trial court to develop facts further, to certify questions to the Supreme Judicial Court or "to proceed to decide other issues, as it believes appropriate." *Palandjian* v. *Pahlavi*, 782 F.2d 313, 314 (1st Cir. 1986). (The *per curiam* opinion dated January 30, 1986 is included at App. N, 62a.)

Thereafter, Pahlavi, alleging no new facts, filed a Motion for Reconsideration of Summary Judgment (App. K, 58a). By

a one paragraph, hand-written notation of February 24, 1986, the trial court allowed Pahlavi's Motion for Reconsideration and for Summary Judgment (App. L, 60a).

On May 20, 1986, Palandjian appealed to the First Circuit from the trial court's February 24, 1986 order and the August 16, 1985 order referred to therein. On December 8, 1986 the First Circuit affirmed the lower court's grant of summary judgment.

Palandjian's present petition arises from the First Circuit's December 8, 1986 ruling with respect to his claim of duress. The First Circuit held that Palandjian's allegations of duress were not sufficient to avoid summary judgment on Pahlavi's statute of limitations defense (Op.; App. Q, 97a). The court made two assumptions before so holding. First, it assumed that "Massachusetts Courts would recognize duress as tolling the statute of limitations in at least certain situations." *See Babco Industries, Inc.* v. *New England Merchants National Bank*, 6 Mass. App. Ct. 929, 930, 380 N.E.2d 1327, 1328 (1978) (Op.; App. Q, 97a). Second, it assumed that "Massachusetts would use a subjective standard for evaluating fear." *See Omansky* v. *Shain*, 313 Mass. 129, 130, 46 N.E.2d 524, 525 (1943) (Op.; App. Q, 97a). Nevertheless, the court held that:

> Although the threats made between 1970 and 1972 might otherwise suffice to establish duress against the filing of a lawsuit, we conclude that Massachusetts would not give them such significance in light of this subsequent history. Indeed, it strains logic to rest a claim of duress against filing a lawsuit on threats unconnected to appellant's pursuit of his legal rights when appellant, in fact, repeatedly took actions similar in kind to filing suit without provoking the slightest suggestion of a threat. There is nothing in

> the record to show that defendant would have reacted differently to the formality of filing a lawsuit than she did to appellant's demands for payment, including one made while he was accompanied by a lawyer. Even if appellant subjectively feared retaliation from defendant if he filed the lawsuit, we believe that Massachusetts would rule that he failed as a matter of law to establish that he was actually under duress. Thus, the District Court correctly granted summary judgment for defendant on this issue.

(Op.; App. Q, 99a-100a.)

Reasons for Granting the Writ.

I. THE DECISION BELOW CONFLICTS WITH SUPREME COURT PRECEDENT SINCE IT FAILS TO VIEW INFERENCES IN A LIGHT MOST FAVORABLE TO THE OPPOSING PARTY OR TO CONSIDER THAT STATE OF MIND IS AT ISSUE.

The Supreme Court has set forth standards for determining whether factual evidence and the inferences which may be drawn therefrom establish a genuine issue of fact for trial. *Anderson* v. *Liberty Lobby, Inc.*, 106 S. Ct. 2505 (1986); *Matsushita Electric Industrial Co., Ltd.* v. *Zenith Radio Corp.*, 106 S. Ct. 1348 (1986) and *United States* v. *Diebold, Inc.*, 369 U.S. 654 (1962). The First Circuit's opinion in the case at bar is inconsistent with this Court's rulings therein set forth. In particular, the First Circuit failed to view the inferences to be drawn from the underlying facts in a light most favorable to the non-moving party, and it failed to recognize the error in

granting summary judgment where petitioner's claims of duress raised issues of state of mind, subjectivity and credibility.

A. *Inferences Must be Viewed in a Light Most Favorable to the Opposing Party.*

The First Circuit's entry of summary judgment was in error because it failed to view "the inferences to be drawn from the underlying facts . . . in a light most favorable to the party opposing the motion." *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962). *Accord, Anderson* v. *Liberty Lobby, Inc.*, 106 S. Ct. 2502, 2513 (1986); *Matsushita Electric Industrial Co., Ltd.* v. *Zenith Radio Corp.*, 106 S. Ct. 1348, 1356-1357 (1986); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 158 (1970); *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962).

In *Diebold*, the Supreme Court stated that summary judgment was erroneously granted where a lower court's "findings represent a choice of inferences to be drawn from the subsidiary facts," and "inferences contrary to those drawn by the trial court might be permissible." In *Diebold*, the government instigated a civil antitrust suit to challenge Diebold's acquisitions of the assets of the Herring-Hall-Marvin Safe Company ("HHM"). The District Court entered summary judgment against the government after finding that "HHM was hopelessly insolvent and faced with immediate receivership" and that "Diebold was the only bona fide prospective purchaser for HHM's business." On direct appeal, the Supreme Court overturned the lower court's decision, holding that the permissibility of contrary inferences to those drawn by the District Court made summary judgment inappropriate.

The First Circuit cited *Diebold* in *Rogen* v. *Ilikon Corp.*, 361 F.2d 260, 266-67 (1st Cir. 1966) when it held that, if it was possible that a trier of fact could answer "yes" to various

questions about the evidence, and also possible that a trier of fact could answer "no" to these same questions, then summary judgment was in error. In *Rogen*, a stockholder sued a corporation and others for securities violations. The stockholder alleged that the defendants had concealed material facts in connection with the sale of stock. The court held that the evidence raised issues of fact as to the corporation's nondisclosures to the stockholder, thereby precluding summary judgment. The court ruled that:

> The standard of review is a rigorous one and not even one chink in the armor of decision can be vulnerable to the question: Taking the facts and inferences most favorable to the losing party, would a trier of fact nevertheless have to find against him?

Id. at 266.

The facts of *Adickes* clarify the Supreme Court's application of the *Diebold* holding. In *Adickes*, a white teacher was arrested on vagrancy grounds after leaving a restaurant where she was refused service because she was accompanied by six female black students. She sued under 42 U.S.C. § 1983 claiming that the police and restaurant owner had conspired to violate her right to equal protection. The teacher produced the testimony of two students who claimed to have seen in the restaurant one of the policemen who later arrested Ms. Adickes. Even though S.H. Kress & Co. ("Kress") produced statements of the waitresses,[3] deposition testimony of the restaurant manager and affidavits of the chief of police and the two arresting officers that there had been no contact between any restaurant employee and the police, the Court held that Kress's failure

[3] The court noted that the statements of both waitresses were unsworn and that one of these statements was provided only to the Supreme Court and had not been provided to the lower court.

to show that there was no policeman in the restaurant required a denial of summary judgment. Even with strong evidence to the contrary, the Court held that "it would be open to a jury in light of the sequence that followed, to infer from the circumstances that the policeman and a Kress employee had a "meeting of the minds" and thus reached an understanding that Petitioner should be refused service." *Id.* at 158.[4]

Diebold and *Adickes* demonstrate that, where inferences contrary to those found by a lower court are permissible,[5] the granting of summary judgment is erroneous. The trial court must ask whether a jury could answer "yes" or could answer "no" to various questions about the evidence. If either answer is possible, then the court must allow the case to proceed.[6] Even where the facts seem to weigh against the non-moving party, as they did in *Adickes*, it is erroneous to grant summary judgment if an inference from those facts leaves open the possibility that a jury could find for that party.

In the present case, the First Circuit failed to consider all possible inferences from the available facts.[7] The facts, in their

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[4] The Supreme Court's ruling in *Adickes* was recently upheld in *Celotex Corp.* v. *Catrett*, 106 S. Ct. 2548, 2554 (1986). In *Celotex*, the court noted that "on the basis of the showing before the Court in *Adickes*, the motion for summary judgment in that case should have been denied."

[5] The term "permissible" is not intended to have any limiting effect. The Supreme Court has on occasion replaced the word "permissible" with "legitimate". *Anderson*, 106 S. Ct. at 2513; *Adickes*, 398 U.S. at 158-59. The Eighth Circuit held that "a plaintiff should be accorded *any and all* favorable inferences," *McSpadden* v. *Mullins*, 456 F.2d 428, 430 (8th Cir. 1972) (emphasis added), and Wright & Miller summarized the available case law as stating that a party must be given "the benefit of *all* favorable inferences that can be drawn from (the evidence)." 10A Wright & Miller, Federal Practice and Procedure § 2727 at 125 (emphasis added).

[6] "It is one thing for a trier of fact to say "no" and another thing to say that a trier of fact could not say "yes"." *Rogen*, 361 F.2d at 267.

[7] The First Circuit recognized that "the threats made between 1970 and 1972 might otherwise suffice to establish duress against the filing of a law-

most simple form, are that: Pahlavi and her representatives made numerous threats on the lives of Palandjian and his family between 1970 and 1972.[8] After that time, Palandjian met on occasion with Pahlavi but did not file suit.

One possible inference from these facts is that, as Palandjian has averred, he continued to fear retaliation if he commenced litigation.[9] Certainly he had grounds for such fear. Pahlavi never revoked her threats. She never told Palandjian that he should come back to Iran and he never did. Although he spoke to her by phone and periodically met with her, she never paid him for his construction work or for his investment (Pal. Aff. II, para. 22; App. C, 13a; para. 23; App. C, 13a-14a). Her power to control his economic situation was made clear by her repeated promises to pay him and her failure to keep those promises. Her capacity to control his, and his family's, physical well-being had earlier been made equally as clear. Not until the source of her power, her brother the Shah, died in 1980, did Paladjian' fear of filing suit begin to dissipate.

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suit." (Op.; App. Q, 99a.) However, the court found that in light of Palandjian's continued dealings with Pahlavi, Palandjian could not claim continued duress (Op.; App. Q, 99a, 100a).

[8] Pahlavi threatened Palandjian with death if he returned to Iran (Pal. Aff. II, para. 16; App. C, 12a). Sanatizadeh, her newly named President of Abadani Jazayer, was verbally abusive and threatening to his staff and to Grigor (Naz. Dep.; App. E, 20a-21a). Her personal assistant, Izadi, demanded Pahlavi's shares from Grigor, telling him "we will have you killed." (Grigor Palandjian Deposition dated September 13, 1984 (hereinafter "Grigor Dep."); App. F, 24a, 25a). And Pahlavi's cousin, Dadsetan, warned Palandjian that if he did not return Cessna Aircraft to Pahlavi "something unpleasant" might happen to his parents (Pal. Aff. I, para. 17; App. B, 6a, 7a; Pal. Aff. II, para. 21; App. C, 13a).

[9] Palandjian claims in his affidavits to have feared Pahlavi's threats. Such fear is substantiated by Palandjian's failure to return to Iran, his advising the staff at Abadani Jazayer to hand power over to Sanatizadeh, his telling his father to turn Pahlavi's share over to Izadi, and his signing of the papers which turned over the Cessna distributorship to Dadsetan (Pal. Aff. I, para. 17; App. B, 6a, 7a; Pal. Aff. II, paras. 17, 20, 21; App. C, 12a, 13a).

A second possible inference from Palandjian's failure to file suit is that he saw a difference between filing suit and meeting with Pahlavi. By filing suit, he could anger Pahlavi by bringing her to court, by bringing their dispute into the public eye and by entering into an adversarial role with her. Whereas, by merely requesting the money, even with a lawyer present, Palandjian could avoid her wrath by simply pleading with her, meeting with her on neutral territory and by keeping the controversy private.

A legally impermissible inference from these facts is the inference drawn by the First Circuit. The First Circuit found that "there is nothing in the record to show (that) (Pahlavi) would have reacted differently to the formality of filing a lawsuit than she did to (Palandjian's) demands for payment, including one made while he was accompanied by a lawyer." (Op.; App. Q, 99a.) This inference is impermissible as it does not view the facts in the light most favorable to the opposing party. Moreover, it is not relevant to determining whether Palandjian continued to feel influenced by duress. Under a subjective standard for evaluating duress, Palandjian's, not Pahlavi's, state of mind is at issue. While an inference which indicates Pahlavi's state of mind may aid in assessing the credibility of Palandjian's claim of duress and the range of permissible inferences that a jury may draw therefrom,[10] it does not justify the entry of summary judgment. A jury must still weigh Palandjian's credibility and ascertain which inferences to draw from his testimony. As long as the possibility remains that a jury could find in favor of Palandjian's claim of duress, summary judgment must be denied. Unfavorable, irrelevant inferences may not be used to obviate the jury's role. *Diebold*, 369 U.S. at 655.

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[10] *See Matsushita*, 106 S. Ct. at 1361.

Certainly a jury could infer from Palandjian's actions that Palandjian, with his $30 million pending claim, would have filed suit had he not been under a continuing sense of fear and duress. As in *Diebold* and *Adickes*, where inferences contrary to those found by the trial court are permissible, summary judgment should not be allowed — where there is one "chink in the armor of decision," a plaintiff must not be effectively deprived of his right to have his factual dispute resolved by a jury.[11]

B. *Summary Judgment is Erroneous Where Credibility Or State of Mind Are At Issue.*

The First Circuit erred by failing to recognize that it is "reasonable to draw conflicting inferences . . . especially where the surrounding facts cast light upon the state of mind of (an individual)." *Empire Electronics Co.* v. *United States*, 311 F.2d 175, 179-180 (2d Cir. 1962). Summary judgment is generally erroneous in state of mind cases since "a determination of someone's state of mind usually entails the drawing of factual inferences as to which reasonable men might differ." 10A Wright & Miller, Federal Practice and Procedure, § 2730 at 238. As "[m]uch depends on the credibility of witnesses testifying as to their own state of mind, . . . the jury should be given an opportunity to observe the demeanor, during direct and cross-examination, of the witnesses whose states of mind are at issue." *Croley* v. *Matson Marigation Co.*, 634 F.2d 73, 77 (5th Cir. 1970), *cited in* 10A Wright & Miller, Federal Practice and Procedure, § 2730 at 237.[12]

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[11] *See Bill Johnson's Restaurants, Inc.* v. *National Labor Relations Board*, 461 U.S. 731, 747 n.12 (1983).

[12] The Advisory Committee Note to the 1963 Amendments to Rule 56(e) states that "where an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate."

The Supreme Court expressed its agreement with these general principles in *Harlow* v. *Fitzgerald*, 457 U.S. 800, 816 (1982) (establishing a qualified immunity and an objective good faith test for determining whether government executives had abused their discretion in terminating employees). The Court noted that "the judgments surrounding discretionary action almost inevitably are influenced by the decision maker's experiences, values and emotions. These variables explain in part why questions of subjective intent so rarely can be decided by summary judgment." *Id.*

The Supreme Court had previously addressed this issue in *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962),[13] (denying summary judgment to CBS and others against the owner of an ultra-high frequency, ("UHF") televi-

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[13] *Poller* was recently upheld in *Anderson*, 106 S. Ct. at 2514. The Supreme Court explained that "we do not understand *Poller* to hold that a plaintiff may defeat a defendant's properly supported motion for summary judgment in a conspiracy or libel case, for example, without offering any concrete evidence from which a reasonable jury could return a verdict in his favor. . . . Rule 56(e) itself provides that a party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleadings, but must set forth specific facts (i.e. present affirmative evidence) showing that there is a genuine issue for trial. . . . We repeat, however, that the plaintiff, to survive the defendant's motion, need only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial." *Id.* at 2514-2515.

Palandjian has not rested upon the mere allegations of his pleadings here. Instead, he has provided "affirmative evidence," by way of documents, affidavits and deposition testimony, which relate the threats leading to his sense of duress. (Pahlavi's letter, Sanatizadeh's visit to Grigor at Abadani Jazayer, Izadi's visit to Grigor to obtain possession of the shares and Dadsetan's insistence upon Palandjian's relinquishing of the Cessna distributorship.) Moreover, his affidavit explains that his failure to file suit was due to a sense of duress which continued until after the death of Pahlavi's brother, the Shah, and until Palandjian came to believe that the Pahlavi family would not return to power in Iran. This evidence is "sufficient" to "require a judge or jury to resolve the parties differing versions of the truth at trial." *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 288-289 (1968).

sion station which brought an antitrust suit claiming an alleged conspiracy to eliminate the station from the broadcast field and to destroy ultra high frequency broadcasting). The Court commented that:

> We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross examination that their credibility and the weight to be given to their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even handed justice."

Id. at 473.

Harlow and *Poller* indicate the Supreme Court's accord with the generally held view that where a trial court is required to make subjective determinations, the court should be reticent to grant summary judgment. Subjective determinations pivot on the inferences which may be drawn from an individual's testimony, which inferences depend upon that individual's credibility. As assessing credibility is exclusively a jury function, the court should not step in to obviate their role.

Like the discretion in *Harlow* and the intent in *Poller*, duress, according to the First Circuit and other circuit and state courts, is determined by a subjective standard (Op.; App. Q, 97a). It therefore, should rarely be precluded by summary judgment. "Where the claimant's affidavit in opposition to defendant's motion for summary judgment sets forth facts that would be admissible in evidence in support of the claim of duress, the defendant's motion should not be granted." 6 Moore's Federal Practice, ¶ 56.17[20] at 56-850. In *Holzman* v. *Barrett*, 192 F.2d 113 (7th Cir. 1951), the Court held that:

> Duress is characterized by the effect which it has upon the mind of the person upon whom it is imposed. . . . And like intent with which an act is committed, we suppose a court would allow considerable latitude in the examination of a witness claiming to have acted under duress. . . . "Whether such duress exists as to a particular transaction is a matter of fact."[14]

Id. at 117. Similarly, in *McNeil* v. *Lovelace,* 529 S.W.2d 633 (Tex. Civ. App. 1975), the court held that "the testimony contained in plaintiff's summary judgment affidavit concerning continuing duress and coercion raised a fact issue on the question of the tolling of the statute of limitations and thus prohibited the granting of summary judgment." *Id.* at 639.

The First Circuit erred in failing to follow Supreme Court precedent concerning subjective assessments on summary judgment. Where subjectivity is a factor, experiences, values and emotions of an individual are brought into play. Thus, the individual's testimony and credibility are crucial to assessing his subjective concerns. Determinations of Palandjian's credibility and of the inferences to be drawn from his testimony are issues properly left to the jury as the ultimate trier of fact. The jury must decide whether it believes that the duress Palandjian experienced between 1970 and 1972 continued to affect his will and ability to bring suit until 1983 (Pal Aff. II, par. 25; App. C, 14a). In such circumstances, summary judgment must be denied.

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[14] Although in *Holzman,* duress was an element of the underlying cause of action, that fact is not relevant here. *Holzman* is not cited here to show that duress tolls the statute of limitations (a principle recognized by the First Circuit). Instead, it is cited to demonstrate that summary judgment is rarely appropriate where allegations of duress are at issue. *See also First National Bank of Cincinatti* v. *Pepper,* 454 F.2d 626 (2d Cir. 1972).

Conclusion.

The Supreme Court should not let stand a decision which directly conflicts with its holdings in summary judgment cases. Where a subjective consideration is at issue, summary judgment is erroneous, since reasonable men may draw conflicting inferences from the testimony presented. Where, as here, the First Circuit has not considered the possibility of conflicting inferences nor viewed the factual inferences in a light most favorable to the party opposing the motion, this Court should issue a writ of certiorari to review the judgment and order of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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